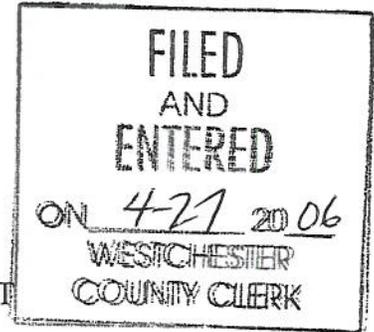


To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - ENVIRONMENTAL CLAIMS PART

-----X
THE VILLAGE OF CROTON-ON-HUDSON, NEW YORK

Plaintiff,

DECISION

Index No. 22176/05

-against-

NORTHEAST INTERCHANGE RAILWAY, LLC
GREENTREE REALTY, LLC,

Defendants.

-----X
NICOLAI, J.

The following papers numbered 1 to 37 were read on this motion by plaintiff for an order granting a preliminary injunction enjoining defendants from commencing operation of a waste transfer station in the Village of Croton-on-Hudson until they obtain a special permit from the Village; and cross motion by defendant for an order dismissing plaintiff's causes of action in the Amended Complaint pursuant to 3211(a)(4) and/or 3211(a)(7); or in the alternative, consolidating the instant action with Greentree Realty, LLC v Village of Croton-on-Hudson (Index No. 11872/05).

| | |
|------------------------------------|------------------------------|
| Order to Show Cause - Affidavit | 1- 3, 8- 10 |
| Notice of Cross Motion - Affidavit | 22- 23, 31 |
| Memorandum of Law | 7, 36, 37 |
| Exhibits | 4- 6, 11- 21, 24- 30, 32- 35 |

Upon the foregoing papers, it is ordered that this motion and cross motion are decided as follows:

Plaintiff commenced the present action to enjoin defendant Northeast Interchange Railway ("NIR") from commencing operation of a waste transfer station on the property located at 1A Croton Point Avenue, Croton-on-Hudson, New York (the "Property"), owned by defendant Greentree Realty LLC ("Greentree"). It is undisputed that this Property was previously owned by the Milano family from the early 1960s, until it was sold to Robert V. Liguori in 1984. According to Louis Milano, whose father owned the property, in the 1970s, the Property was used principally as a construction yard for the Milano's construction business. Louis Milano further stated that in 1970, the Milanos

contracted with Westchester County to provide sand as cover for the landfill until 1978, when the contract was terminated. According to Louis Milano, in 1978 the Property was used for a truck repair business. (This assertion is supported by Zoning Board of Appeals minutes dated February 9, 1977, when the Milano's lawyer appeared on their behalf for the "continuance of a nonconforming use permit for the repair & service of motor vehicles.")¹ According to the affidavit of the Village Manager, Richard F. Herbek, in 1984, the Milanos sold the Property to Robert V. Liguori who obtained a special permit to change from one nonconforming use (truck repair) to another (wood waste recycling). Thereafter, in 1988, the Village of Croton-on-Hudson issued a special use permit to Industrial Recycling Systems ("IRS"), authorizing it to operate a wood processing and recycling transfer station on the Property, thereby creating the nonconforming use of a waste transfer station. In 1997, Greentree purchased the Property and leased it to Metro Enviro which requested and received a renewal and transfer of the pre-existing special use permit held by "IRS." The Department of Environmental Conservation issued a Part 360 Solid Waste Management Permit to Metro Enviro to operate a waste transfer station on the Property and imposed a number of conditions on the issuance of the permit. In 1998, the Village Board of Trustees of the Village of Croton-on-Hudson (the "Board") issued the special use permit under §230-53.A (the successor to §7.1.1.2) providing numerous conditions, for a three-year duration. However, on January 27, 2003, the Board issued a Statement of Findings denying Metro Enviro's renewal application based upon certain violations of the special use permit. This denial to renew the special permit, however, did not extinguish the existing prior nonconforming use.

It is undisputed that the Property is located in the Village of Croton-on-Hudson's Light Industry L1 Zoning District.² The 1979 Zoning Code provides in pertinent part:

§7.1 NON-CONFORMING BUILDINGS AND USES

Subject to the provisions of §7.1.6 the following provisions shall apply to all buildings and uses existing on the effective date of this local law, which buildings and uses do not conform to the requirements set forth in this local law; to all buildings and uses that become non-conforming by reason of any subsequent amendment to this local law and the zoning map which is a part thereof; and to all buildings housing non-conforming uses:

¹Defendants submitted an affidavit of Angelo Milano who stated that his family "used the Property as a repair garage and for the storage and transfer of various products and materials, such as rocks, stone, soil and other debris." Mr. Milano concluded that the products and materials were obtained from the construction business which was in existence prior to 1979, when the Village amended its Zoning Code. This assertion is disputed by the Village Manager, who stated that "the property was used mainly to do the repair work on the Milanos' trucks, which they used in their construction business. The property was also used to transfer clean sand in connection with the contract that the Milanos had with Westchester County to provide cover material for the Croton Point Landfill."

²Until 1979, the district was known as the "Manufacturing M District."

7.1.1 Any non-conforming use, except those non-conforming uses specified in § 7.1.5, be continued indefinitely, but:

7.1.1.2 Shall not be changed to another non-conforming use without a special permit from the Village Board of Trustees, and then only to a use which, in the opinion of said Board, is of the same or a more restricted nature....

The Zoning Code, currently in effect in the Village has been amended over the years. The 1961 Zoning Code regulating the “Manufacturing M District” where the Property is located, described the permitted use as follows:

Manufacturing, assembly, converting, altering, finishing, cleaning or any other processing or storage of products or materials...[§ 3.10.1.g]

The 1979 Zoning Code, regulating the “Light Industrial L1 Zoning District”, where the Property is located, added the word “light” and dropped the language “or materials” to permit:

Light manufacturing, assembly, converting, altering, finishing, cleaning or any other processing or storage of products...[§ 230-18B(2)]³

In support of the application for a preliminary injunction, plaintiff asserts that the only way in which another waste facility operator, such as NIR, can take advantage of the Zoning Code’s protection of pre-existing legal nonconforming uses, is if the waste processing use existed in 1979 when the zoning code amendment disallowing it, was enacted. Plaintiff asserts that a waste transfer station was not a lawful use under the 1979 Zoning Code nor under the 1990 Zoning Code. More importantly, in 1979, a waste processing facility was not operating at the 1A Croton Point Avenue location. Therefore, pursuant to §7.1 and its’ current counterpart §230-53, only lawful uses that existed on the effective date of the new Zoning Code or subsequent amendments may continue indefinitely. Plaintiff concludes therefore, that the use of the Property as a transfer station was not an as-of-right use when Metro Enviro began its construction and demolition debris operations in 1998, and therefore, it was not a lawful pre-existing nonconforming use entitled to continue indefinitely. Since the use that was allowed to operate at the Property was only allowed by virtue of the nonconforming use special permit (granted to Metro Enviro in 1998), and the refusal to renew that special permit was upheld by the Court of Appeals in Metro Enviro Transfer, LLC v Village of Croton-on-Hudson, 5 NY3d 236, the right to continue the nonconforming use was lost.

Defendants oppose the motion upon the grounds that the construction and demolition debris

³The 1990 Zoning Code similarly describes the manufacturing use as in the 1979 Zoning Code, but the nonconforming use provision is renumbered §230-53.A(2).

transfer station and processing facility (the "Facility") is a "pre-existing, legal nonconforming use" which is not required to obtain a special permit or variance to continue. Since the use of the Property for processing waste was expressly permitted under the Zoning Code, defendants maintain that the Village has sanctioned the Property as a pre-existing, legal nonconforming use. The relevant provision of the Zoning Code is section 230-53 which provides in pertinent part:

A. Any nonconforming use...may be continued indefinitely, but:

(2) Shall not be changed to another nonconforming use without a special permit from the Village Board of Trustees and then only to a use which, in the opinion of said Board, is of the same or a more restricted nature.

Defendants assert that the Zoning Code is clear that a nonconforming use "may be continued indefinitely" particularly since the use of the Property is not going to be changed. Furthermore, defendants assert that NIR and RS Acquisition Co., LLC ("RSA"), the current lessee, expressly stipulate that they will operate the Facility within the parameters of the pre-existing, nonconforming use that existed prior to the amendments to the Zoning Code in 2001.

Village Law §§7-714 and 20-2006 permit the Village to seek preliminary injunctive relief to enforce its zoning law. The Village correctly contends the special permit expired in 2001, and the termination of the special permit was upheld by the Court of Appeals in Metro Enviro Transfer, LLC v Village of Croton-on-Hudson (id). While the non-renewal of Metro Enviro's nonconforming use special permit did not eviscerate the protected property rights at issue, it is undisputed that eight years have elapsed since the special permit was issued to Metro Enviro, and prior to the issuance of a new special permit, the Village has the right to impose conditions necessary to prevent harm to the community and the environment. Thus, the Village must be able to assure its citizens that a new operator will manage the Facility in such a way that it will not harm their health, safety and welfare.

After hearing oral argument and in view of the foregoing, the Court finds that plaintiff has demonstrated its right to injunctive relief. Accordingly, plaintiff's motion for a preliminary injunction is granted. NIR and its affiliate RSA are therefore enjoined from operating a transfer station at the Property without first obtaining a special permit in accordance with the Village's Zoning Code. Upon application by defendants, the Village will issue a determination within a reasonable time frame. The mandatory undertaking required by CPLR 6312(b) is fixed at \$25,000.

The cross motion is granted solely to the extent that the instant action is consolidated with Greentree Realty, LLC v Village of Croton-on-Hudson (Index No. 11872/05).

Dated: White Plains, New York
April 25, 2006


FRANCIS A. NICOLAI
A.J.S.C.

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